IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Civil Revision No. 144 of 2006.

Date of Decision: 10th September, 2007

Himanshu Mahajan. **Petitioner.**

Versus

Rashu Mahajan and others. **Respondents.**

Coram

The Hon'ble Mr. Justice V.K. Gupta, C.J.

Whether approved for reporting?[1] Yes.

For the petitioner: Mr. K.D. Sood, Advocate.

For the respondents: Mr. Bimal Gupta, Advocate, for respondent No.1.

V.K. Gupta, C.J.

In this revision petition filed under Section 115 of the Code of Civil Procedure, the petitioner has challenged an order passed on 11th September, 2006 by the learned Civil Judge (Senior Division), Sundernagar. Vide this order, the learned Court below rejected the preliminary objection raised on behalf of the petitioner to the effect that it did not have territorial jurisdiction to entertain and proceed with the petition filed by respondent No.1 against the petitioner and respondents No.2 to 5 under Section 25 of the Guardians and Wards Act, 1890. By thus rejecting the aforesaid

[1] Whether the reporters of Local Papers may be allowed to see the judgment?

preliminary objection of the petitioner, the learned Court below held that it has the jurisdiction to entertain and proceed with the aforesaid petition.

Brief facts leading to the filing of this petition are that the marriage of the petitioner and respondent No.1 was solemnized on 25th November, 2003 according to Hindu rites as well as rituals at New Delhi and out of the wedlock Master Aryan (Chakshi) was born on 2nd January, 2005 at Inderpur Grover Nursing Home, New Delhi. The petitioner and respondent No.1 lived together at New Delhi. Whereas respondent No.1 belongs to Tehsil Sundernagar, District Mandi in Himachal Pradesh, the petitioner belongs to New Delhi. It was the contention of respondent No.1 that she was ousted from the house of the petitioner on 10th August, 2005. The allegations with respect to demands of dowry, mal-treatment and harassment etc. have also been levelled by respondent No.1 against the petitioner during her stay with the petitioner at New Delhi. Apparently, respondent No.1 as a consequence of the marital discord between the husband and wife left New Delhi and came to Sundernagar to reside with her parents. It is the allegation of respondent No.1 that while she left New Delhi for Sundernagar, she was not allowed the custody of her son who was forcibly kept at New Delhi by the petitioner and respondents No.2 to 5. It is in this background that respondent No.1 filed a petition under Section 25 of the Guardians and Wards Act, 1890 (1890 Act for short) for the custody of Master Aryan, her son. It is in this petition, based on the aforesaid circumstances that the petitioner raised a preliminary

objection in the trial Court that since Master Aryan, the son whose custody was the subject matter of the petition under Section 25 of the 1890 Act was ordinarily residing at New Delhi, the Courts at New Delhi alone have jurisdiction to entertain and proceed with an application under Section 25 of 1890 Act and that the Court at Sundernagar did not have the territorial jurisdiction for this purpose. As noticed at the outset, the aforesaid preliminary objection did not find favour with the learned Court below which, while rejecting the same decided that it has the jurisdiction and accordingly proceeded to deal with the case. In taking this view the learned Court below was guided and influenced by the fact that the expression "ordinary residence" of the child is to be construed with reference to the residence of the mother. This view of the learned Court below was buttressed by the consideration that a child below the age of 5 years is to reside ordinarily with the mother and, therefore, since the mother is residing at Sundernagar and even though the child is not residing at Sundernagar and had never resided at Sundernagar, the Court at Sundernagar had the jurisdiction to deal with the case.

Section 9 of 1890 Act reads thus:-

> "9. Court having jurisdiction to entertain application.-
> (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.
> (2) If the application is with respect to the guardianship of the property of the minor, it may be

made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction."

The learned Court below, as observed hereinabove in support of its view that the residence of the mother should determine and influence the residence of the child apparently was influenced and guided by the consideration that a child below the age of five years is supposed to reside ordinarily with the mother. Even though in the impugned order no reason for this view has been expressed, apparently the learned Court below had in mind Section 6 of the Hindu Minority and Guardianship Act, 1956. Clause (a) of this Section which is relevant for our purposes is reproduced hereinbelow . It reads thus:-

"6. Natural guardians of a Hindu minor.- The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or an unmarried girl-the father, and after him, the mother; provided that the custody of a minor who has not completed the

age of five years shall ordinarily be with the mother; ……."

It was perhaps the aforesaid stipulation in Clause (a) to the effect that the custody of a minor who has not completed the age of five years should ordinarily be with the mother which resulted in the learned Court below taking the aforesaid view leading to the aforesaid decision with respect to the ordinary residence of the child being at Sundernagar.

During the course of arguments in this case it was accepted by the learned counsel for the parties that the child always stayed, ever since his birth and continues to stay at New Delhi and that the child never came to or ever stayed at Sundernagar. Actually it has been accepted by the learned counsel for the parties that neither the child was ever removed or shifted from New Delhi nor was any attempt ever made by anyone to do so. I am specifically referring to this aspect of the matter because the actual fact with respect to the physical residence of the child always being at New Delhi has not been disputed by anyone nor is it the contention of respondent No.1 at all that the child ever stayed at Sundernagar. Therefore, there is no dispute on a question of fact, with respect to the place where the child has actually and physically been residing. The only ground therefore on which the learned Court below has assumed territorial jurisdiction is relatable to the residence of respondent No.1 (mother) at Sundernagar because the learned Court below has taken the view that irrespective of the fact

where the child is actually and physically residing, the residence of the mother at Sundernagar would clothe the Court at Sundernagar with jurisdiction to try the petition. I have, therefore, to decide in this case as to whether this view of the Court below is legally correct or not.

In the case of **Harihar Pershad Jaiswal** vs. **Suresh Jaiswal and others**, reported in AIR 1978 Andhra Pradesh 13 dealing with the aforesaid aspect it was held as under:-

> ".....If the expression "place of ordinary residence" means the residence of his natural guardian, the very purpose of using the word "the residence of the minor" in Section 9 would be lost. It is not the place of residence of the natural guardian that gives the jurisdiction to the court under Section 9(1) but it is the place of ordinary residence of the minor and the Legislature has designedly used the words "where the minor ordinarily resides". Hence the actual residence of the minor, having regard to the circumstances under which the minor happens to reside at a particular place must be taken into consideration in deciding the place where the minor ordinarily resides. ....."

In the case of **Smt. Jeewanti Pandey** vs. **Kishan Chandra Pandey**, AIR 1982 SC 3, in which the word "resides" occurring in Section 19 of Hindu Marriage Act, 1955 came up for consideration and discussion, their Lordships of the Supreme Court held thus:-

> "13. It is plain in the context of Clause (ii) of Section 19 of the Act, that the word 'resides" must mean the actual place of residence and not a legal or constructive

> residence: it certainly does not connote the place of origin. The word 'resides' is a flexible one and has many shades of meaning, but it must take its colour and content from the context in which it appears and cannot be read in isolation. It follows that it was the actual residence of the appellant at the commencement of the proceedings, that had to be considered for determining whether the District Judge, Almora had jurisdiction or not. That being so, the High Court was clearly in error in upholding the finding of the learned District Judge that he had jurisdiction to entertain and try the petition for annulment of marriage filed by the respondent under Section 12 of the Act."

In the case of **Harshadbhai Zinabhai Desai** vs. **Bhavnaben Harshadbhai Desai,** reported in AIR 2003 Gujarat 74 same issue with respect to the jurisdiction of the Court under Section 25 read with Section 9 of 1890 Act, in the context of the actual residence of the child and the residence of the mother, on identical facts came up for consideration and discussion. The dispute between the husband and the wife relating to the custody of the minor child " Roshni" having arisen, the mother filed an application under Section 25 of 1890 Act in the District Court at Valsad on the ground that she was residing at Umargaon within the jurisdiction of District Court Valsad, and that Court had the jurisdiction to deal with the matter even though at the time of the filing of the petition Roshni was actually and physically residing at Dadra with her father which admittedly was not within the territorial jurisdiction of District Court Valsad. The learned District

Judge taking the view that the child being of tender age her custody was required to be given to the mother and since the mother was residing at Umargaon the child should be deemed to have her ordinary residence at Umargaon and, therefore, the District Court at Valsad had the jurisdiction to entertain the petition under Section 25 of the Act. Taking up for consideration the question as to whether the reasoning adopted by the District Judge was sound and whether Roshni can be said to have been ordinarily residing at Umargaon, the learned Single Judge of Gujarat High Court held as under:-

> "14. .....The question of ordinary residence of a minor is a matter of fact to be ascertained from the evidence on record. The ordinary residence of a minor cannot be determined on the basis of presumption or there cannot be a hard and fast rule that the residence of a natural guardian or the residence of the mother of a minor should be treated as the ordinary residence of the minor."

Based on the aforesaid exposition of the settled principle of law, the learned Judge went on to observe as under:-

> "16. In the present case, it is not disputed that the minor 'Roshni' has been residing with her father at Dadra ever since she was of a very tender age. She was not brought to Dadra by force. She accompanied her mother to Dadra. It was but natural that the applicant-mother, after the birth of minor 'Roshni' took her to her father's home at Dadra. In my view therefore, minor 'Roshni' has been residing at Dadra as it is her natural home. Further, the minor 'Roshni' has been residing at

> Dadra continuously. The residence of her father at Dadra therefore, should be treated as the ordinary residence of minor 'Roshni'. Any application under Section 25 of the Act, should have been made to the District Court having jurisdiction over Dadra. Admittedly, the District Court, Valsad, has no territorial jurisdiction over Dadra."

In the case of **Vinod Goyal** vs. **Smt. Sarita Goyal**, reported in AIR 2006 Uttaranchal 36 where similar issue with respect to the custody of a child actually and physically residing at Saharanpur arose in the context of the mother's assertion that she residing at Haridwar (child admittedly not residing with her at Haridwar), the Courts at Haidwar have the jurisdiction to entertain the petition under Section 25 of 1890 Act, their Lordships constituting the Division Bench of Uttaranchal High Court observed as under:-

> "8. .....In the present case admittedly the child is in the custody of the appellant who lives in Saharanpur. In our opinion, since admittedly, the minor in the present case, is living at Saharanpur as such it cannot be said that he ordinarily resides at Haridwar. Had it been a case where the minor was going to and living of and on in Haridwar, in that case we would have agreed to the suggestion that the minor be treated to be residing ordinarily at Haridwar. But it is not the case here."

The ratio culled out from all the aforesaid judgments clearly points out to a well settled proposition of law that it is the

actual residence of the child which determines the territorial jurisdiction of the Court and that the residence of the mother alone, unsupported by the fact of the child residing with her, does not determine the territorial jurisdiction of the Court. Mr. Bimal Gupta, learned counsel appearing for respondent No.1 cited two judgments taking the contrary view.

In the case of **K.C. Sashidhar** vs. **Smt. Roopa**, reported in AIR 1993 Karnataka 120, where the mother was residing at Mysore and the child with her father was residing at Bombay, the view taken by a learned Single Judge of the Karnataka High Court was that since the child is of tender age the legal guardian being her mother, her place of residence on the date of the presentation of the petition is the place where it should be construed that the child "ordinarily resided". The following observations are apposite and I quote:-

> "5. In the instant case, since the child is of tender age, the legal guardian would be the mother and the place of her residence, on the date of the presentation of the petition, is the place where it is to be construed as the minor "ordinarily resided" and as such the finding arrived at by the Court-below does not suffer from any legal infirmities. Hence the circumstances do not warrant interference of this Court in exercise of its power under Section 115 of the C.P.C. Accordingly, the C.R.P. is dismissed. No costs."

A learned Single Judge of Punjab and Haryana High Court in the case of **Smt. Sarabjit wd/o Sh. Kukesh Kumar** vs.

Sh. Piara Lal and another, reported in AIR 2005 Punjab and Haryana 237 took a similar view, by referring to Section 6 of 1956 Act. In this judgment, the learned Single Judge of the Punjab and Haryana High Court by holding that Section 6(a) of 1956 Act makes it mandatory that the custody of a minor who is less than five years must always be with the mother. The expression "where the mother ordinarily resides" has necessarily to be interpreted to mean the residence of the mother. The following observations in that judgment indicate the view adopted by the learned Judge:-

> "11. The question then arise whether the expression 'minor ordinarily resides' used in Section 9 could be construed to mean that the minor would cease to reside with his mother. Once under Section 6(1), it is mandatory that a child below the age of 5 years has to reside ordinarily with the mother then the expression 'where the minor ordinarily resides' has to be interpreted to mean the residence of the mother. In other words the residence of the mother would follow the residence of the son. This proposition is supported by the view taken by the Karnataka High Court in the case of K.C. Sashidhar (supra). I am further of the view that the learned Guardian Judge has lost sight of the fact that a period of 2 years had already expired since the filing of application by the petitioner. It is appropriate to mention that the application was filed on 17.3.2002 and she was non-suited by sustaining the objection of lack of territorial jurisdiction. After such a delay ordinarily the petition should not be returned by sustaining the objection of territorial jurisdiction."

With utmost respect, I disagree with the aforesaid contrary view taken and expressed by the Karnataka and Punjab and Haryana High Courts. Clause (a) of Section 6 of 1956 Act merely stipulates and provides that the custody of a minor who has not completed the age of five years shall **ordinarily** be with the mother (emphasis supplied by me). The use of the word "ordinarily" in Clause (a) clearly indicates legislative intent that even though in normal course and normal circumstances the custody of a child below the age of five years should normally be with the mother, it cannot be mandatorily so in every fact situation, irrespective of various reasons, grounds and circumstances. Yes, it is very desirable that in normal circumstances the custody of an infant should be with the mother, she being the child's natural guardian of the first choice, but there can be circumstances galore where it may not either be possible or desirable for such custody of the infant child being with the mother. For instance, the mother may not be leading chaste life. She may be immorally entangled with some one else, leading to estranged matrimonial relationship with her husband, the father of the child. She may be sick, physically or mentally or may be suffering from any disability, not conducive for ideal upbringing of the child. She may financially be a destitute, with hardly any means to maintain herself, what to speak of properly maintaining the child. On the other hand, the father may not be suffering from any of the aforesaid or other negative characteristics and may be leading a life which is very conducive for the upbringing of the child. The aforesaid provision in Clause (a) of

Section 6 of 1956 Act, therefore, cannot be held to be of mandatory or binding nature.

Section 6(a) of 1956 Act and Section 9 of 1890 Act operate in different fields. Both are independent of each other. Whereas Section 6 of 1956 Act deals with the issue of the natural guardianships of a Hindu minor, and Clauses (a), (b) and (c) define the natural guardians, Section 9 of 1890 Act lays down the rule with respect to the territorial jurisdiction of the Court where the application for the custody of a child has to be filed. This Section clearly relates to and refers the "ordinary residence" of the child and says that only such Court shall have the jurisdiction to entertain the petition where the child "ordinarily resides". The issue of the natural guardianship of the child being the subject matter of Section 6 of 1956 Act cannot be thrust upon, linked with or imported into Section 9 of 1890 Act. If the Legislature intended that the residence of the mother or the father of the child should determine the ordinary residence of the child himself, it should have used the expression to that effect in Section 9 of 1890 Act. It did not do so. It used and specified the expression "ordinary residence" of the child himself. The expression is unambiguous and totally certain as well as clear. Taking a cue from the observations made by their Lordship of the Supreme court in the case of Smt. Jeewanti Pandey, AIR 1982 SC 3 (supra), it can safely be said that the expression "ordinary residence" must mean the actual, physical place and not a legal or constructive residence.

The learned Court below, therefore, fell in error in taking the view that because the mother was staying at Sundernagar, it had the jurisdiction to entertain the petition and try the same. The view is patently erroneous and deserves to be rejected.

For the aforesaid reasons, this petition is allowed. The impugned order is set aside. Because the learned Court at Sundernagar does not have the territorial jurisdiction the petition filed by respondent No.1 in that Court is dismissed only on the ground of lack of territorial jurisdiction. It goes without saying that respondent No.1 shall be at liberty to file a fresh petition before a Court of competent jurisdiction.

The petition is allowed. No order as to costs.

CMPs No.547/2006 and 780/2006.

In view of the order passed in the revision petition, both the applications are disposed of. Interim order passed on 29th September, 2006 shall stand vacated.

September 10, 2007. (V.K. Gupta), C.J.
(tr)